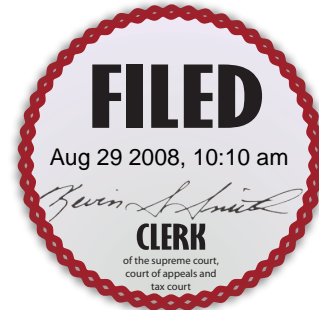


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JACQUE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0801-CR-12
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton Pratt, Judge  
Cause No. 49G01-0601-MR-10045

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**August 29, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant-Defendant Jacque Johnson (“Johnson”) appeals his convictions and sentences for Murder, a felony,<sup>1</sup> and Robbery, as a Class B felony.<sup>2</sup> We affirm the Murder conviction, reverse the Robbery conviction, and remand to the trial court with instructions to vacate the concurrent twenty-year sentence for Robbery.

## **Issues**

Johnson presents five issues for review, which we consolidate and restate as the following three issues:

- I. Whether the State failed to present sufficient evidence of probative value to support his convictions,
- II. Whether the admission of photographs of the victim was fundamental error; and
- III. Whether he was properly sentenced.

## **Facts and Procedural History**

In 2004, Johnson, Dana Foley (“Foley”), Daymon Holbert (“Holbert”), and LaShawn Campbell (“Campbell”) all lived in the Village Square Apartments in Indianapolis. Each of them was involved in the sale of cocaine or crack cocaine. Beginning in May of 2004, Johnson would often stay overnight at Foley’s apartment and Holbert was a daily visitor.

During the weekend of June 19 and 20, 2004, Foley heard Holbert talking with

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<sup>1</sup> Ind. Code § 35-42-1-1.

<sup>2</sup> Ind. Code § 35-42-5-1. Johnson does not challenge his conviction for Carrying a Handgun Without a License, as a Class A misdemeanor, Ind. Code § 35-47-2-1.

Johnson about his need for money and his hope to “hit a lick,” which Foley understood to mean a robbery. (Tr. 727.) Holbert suggested robbing a gas station but Johnson was concerned about the presence of cameras. Holbert made a telephone call, but learned that the person he was trying to reach was out of town.

On June 21, 2004, Holbert came to Foley’s apartment to get Johnson. They left together twice. The second time, Holbert instructed Johnson to hurry. About forty-five minutes later, Johnson returned, and was “looking scared,” shaking his head, and refusing to answer Foley when she asked what was wrong. (Tr. 737.) Holbert came in shortly thereafter. He thanked Johnson and told him “he did fine.” (Tr. 737.) Johnson took a brown paper bag and put it on a closet shelf. After Holbert and Johnson left, Foley looked in the brown paper bag and saw that a handgun was inside it.

About twenty or thirty minutes later, Foley’s neighbor Corey Bensley (“Bensley”) knocked on Foley’s door. He asked her to accompany him to investigate what appeared to be a woman’s body slumped inside a running vehicle. Foley and Bensley crossed the street to a parking lot at a soccer complex and discovered Campbell’s dead body. Campbell, who had recently returned from a gambling trip, had been shot six times. A police search of her vehicle yielded two handguns and \$628.00 but no drugs.

Later that evening, Johnson confessed to Foley that he had met Campbell, got into the backseat of her vehicle, and shot her until the gun was empty. The next morning, Foley awoke to find Johnson cooking and smoking crack cocaine with two other men. There was more cocaine in her apartment than Foley had ever seen before.

On July 13, 2004, Johnson, his mother, his mother's boyfriend, and Foley were in a vehicle when they were detained in connection with the investigation of a robbery on the eastside of Indianapolis. Officers recovered shells from the vehicle and found them to be of the same brand as those used in Campbell's murder and the eastside robbery. The eastside robbery victim had been shot in the foot and forensic testing had disclosed that the bullet retrieved from his foot had been fired from the same weapon that had been used to kill Campbell.

During the traffic stop, Johnson's mother was able to place a handgun into Foley's purse. Foley disposed of the handgun in some weeds. She initially refused to incriminate Johnson in Campbell's murder, but eventually cooperated with the murder investigation and disclosed Johnson's confession.

On January 20, 2006, the State charged Johnson with Murder, Felony Murder, Robbery, and Carrying a Handgun Without a License. Johnson was brought to trial, along with co-defendant Holbert, on November 26, 2007. The Felony Murder count was dismissed at the outset of the trial, and Johnson was found guilty of the remaining charges.

On December 7, 2007, Johnson was given concurrent sentences of sixty years for Murder, twenty years for Robbery, and one year for Carrying a Handgun Without a License. He now appeals.

## **Discussion and Decision**

### **I. Sufficiency of the Evidence**

Johnson argues that his convictions for Murder and Robbery should be reversed

because he was convicted solely upon Foley’s “self-serving” and “inherently improbable” testimony. Additionally, he notes there was no evidence that Campbell, at the time of her death, was in possession of the cocaine-filled Crown Royal bag, which Johnson was alleged to have stolen.

In order to convict Johnson of Murder, as charged, the State was required to establish that he knowingly killed Campbell by shooting her. See Ind. Code § 35-42-1-1. In order to convict Johnson of Robbery, as charged, the State was required to establish that he took a Crown Royal bag containing cocaine from Campbell by putting Campbell in fear or using or threatening the use of force against her. See Ind. Code § 35-42-5-1, App. 44-45.

There must be substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). In reviewing a claim of insufficient evidence, we look only to the evidence most favorable to the judgment and all reasonable inferences that support the judgment. Hubbard v. State, 719 N.E.2d 1219, 1220 (Ind. 1999.) We neither reweigh the evidence nor judge the credibility of the witnesses and will affirm the conviction unless, based on this evidence, we conclude that no reasonable jury could find the defendant guilty beyond a reasonable doubt. Id. Testimony from a single witness can be sufficient to sustain a conviction. Id.

In rare cases, the “incredible dubiousity rule” will permit an appellate tribunal to impinge upon the jury’s responsibility to judge the credibility of witnesses. Berry v. State, 703 N.E.2d 154, 160 (Ind. 1998). Application of the rule is limited to cases where a sole

witness provides inherently contradictory testimony that is equivocal or coerced, and no circumstantial evidence supports the defendant's guilt. Id.

Foley testified as follows. Holbert was in need of money and engaged Johnson in discussions about "hitting a lick." (Tr. 727.) After Johnson opined that robbing a gas station would be too risky, Holbert attempted to reach an individual by telephone but learned that the person was out of town. The next day, Holbert came to Foley's apartment and roused Johnson out of bed. Holbert and Johnson left together and Johnson returned after a short while. Holbert returned for Johnson and told him to hurry. The pair left for about forty-five minutes. Johnson appeared frightened and was reluctant to speak. Holbert reassured him that he had done well. Johnson placed a brown paper bag in Foley's closet. Foley investigated and found that the bag contained a handgun.

That same afternoon, Bensley sought Foley's assistance, and they discovered Campbell deceased in her vehicle. Johnson later confessed to Foley that he had entered Campbell's vehicle and shot her until his gun was empty.

Johnson argues that Foley's testimony must be excluded in its entirety because Foley offered improbable statements and because she was a drug user and dealer. More specifically, Johnson claims that Foley was "equally capable of having performed this murder herself and then blaming two others for it." Appellant's Brief at 11.

Johnson presents no basis for applying the incredible dubiousity rule. We are not confronted with a situation in which a single witness provides inherently contradictory and uncorroborated testimony. Foley consistently maintained that Johnson and Holbert planned

to commit a robbery, that they left the apartment together and Johnson returned in an agitated state and placed a handgun in Foley's closet shortly before Foley and Bensley saw Campbell's dead body, and that Johnson subsequently confessed to having shot Campbell until he emptied his gun. Other witnesses corroborated details of that testimony, revealing that Holbert had been planning a robbery and that Johnson had access to bullets of the type recovered from Campbell's body. The pathologist testified that Campbell had sustained six separate gunshot wounds.

Johnson simply asks this Court to negatively assess Foley's credibility because of her past drug use and drug dealing. However, the trier of fact, rather than this Court, is in the best position to weigh the evidence presented and determine credibility. Graham v. State, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), trans. denied. Furthermore, the incredible dubiousity rule is not implicated even though Foley's initial statements to police did not incriminate Johnson. The incredible dubiousity rule has application only when the factfinder is presented with equivocal in-court testimony. See Corbett v. State, 764 N.E.2d 622, 626 (Ind. 2002) (holding that inconsistencies between a witness's statement to police and his trial testimony did not render his testimony inherently contradictory as a result of coercion); Love v. State, 761 N.E.2d 806, 810 (Ind. 2002) (holding that the victim's testimony was not incredibly dubious or coerced although she initially denied, during an out-of-court conversation with her mother, that the defendant had molested her); Holeton v. State, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006) (holding that discrepancies between statements made to police and trial testimony goes only to the weight of that testimony and witness credibility

and does not render the testimony inherently contradictory). Foley's trial testimony was not equivocal, and she maintained that she initially kept quiet because of her fear of Johnson and her sense of duty as a girlfriend. Inconsistencies between her prior statement and her trial testimony go to the weight and credibility of the testimony but do not render it incredibly dubious.

The State presented evidence that Campbell was found dead of gunshot wounds, that on that same day Johnson placed a gun in Foley's closet, and that Johnson had confessed to Foley that he shot Campbell. This is sufficient evidence from which the factfinder could conclude that Johnson murdered Campbell.

As for Johnson's Robbery conviction, the State did not present sufficient evidence that Johnson robbed Campbell of a Crown Royal bag containing cocaine, as alleged. Although witnesses stated that Campbell was frequently in possession of cocaine, no witness testified that Campbell had a Crown Royal bag and cocaine in her possession on the day that she was killed. The State argues that Campbell's possession is established by Foley's testimony that Johnson had a quantity of drugs the next day and that Johnson told Foley he had asked Campbell "is this good shit." (Tr. 747.) Foley explained that this is a common reference to drugs.

While the statement and Foley's explanation indicates the presence of drugs, it does not establish the type of drugs. Moreover, divergent inferences may be drawn from the statement. Campbell could have had drugs with her, she could have promised to provide Johnson with drugs in the future, Johnson could have brought drugs to Campbell, Johnson

could have paid Campbell for drugs, or Johnson could have obtained drugs from Campbell by using or threatening force.

The State did not present sufficient evidence from which the fact-finder could conclude, beyond a reasonable doubt, that Johnson took cocaine from Campbell by using force or the threat of force. Accordingly, the Robbery conviction must be reversed and the twenty-year concurrent sentence must be vacated.

## II. Admission of Photographs

Johnson contends that the State used a photograph of a youthful and smiling Campbell to “inflame the passions of the jury” and also introduced a pre-autopsy photograph of Campbell’s body to “assault the jury’s emotions.” Appellant’s Brief at 6.

Because he did not object at trial, Johnson now couches his argument in terms of “fundamental error.” The fundamental error exception is extremely narrow. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). Fundamental error is error that is “so prejudicial to the rights of the defendant as to make a fair trial impossible.” Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999).

Here, a photograph of Campbell was admitted in conjunction with identification testimony. The prosecutor did not belabor Campbell’s youthfulness or promising future. The record provides no indication that the jury was invited to avenge her untimely death regardless of the evidence, as Johnson suggests. The pre-autopsy and autopsy photographs were not unduly graphic and were submitted to illustrate the testimony of Dr. Stephen Radentz, who testified concerning autopsy procedures and findings. We find no evidence of

an unduly prejudicial “assault on the jury’s emotions” and no basis for the allegation that Johnson was denied a fair trial.

### III. Sentence

At the time of Johnson’s offense, Indiana Code Section 35-50-2-3 provided that a person who committed murder should be imprisoned for a fixed term of fifty-five years, with not more than ten years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. The trial court imposed a sixty-year sentence, upon finding as aggravators that Johnson had a criminal record and a history of violence, the nature of the crime was heinous, and Johnson was the shooter.

Johnson contends that the trial court’s factual findings that the crime was heinous and he was the shooter were made in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely v. Washington, 542 U.S. 296 (2004). The Blakely Court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” The Blakely Court defined the relevant statutory maximum for Apprendi purposes as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”

In Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 546 U.S. 976 (2005), our Supreme Court applied Blakely to invalidate portions of Indiana’s sentencing

scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. Thus, in the wake of Blakely, a trial court could only enhance a presumptive sentence based upon those facts that “are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding.” Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).

Johnson was sentenced long after Blakely and Smylie were decided yet he made no objection to the factfinding of the trial court. Because Johnson’s case was not on direct review at the time Blakely was decided, it was incumbent upon him to object. See Clark v. State, 829 N.E.2d 589, 590 (Ind. Ct. App. 2005). He did not do so and thus he forfeited a Blakely challenge to his sentence.<sup>3</sup>

Finally, Johnson requests that we conduct our independent review of the nature of the offense and character of the offender pursuant to Indiana Appellate Rule 7(B) and revise his sixty-year sentence to the presumptive sentence of fifty-five years.<sup>4</sup> Indiana Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration

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<sup>3</sup> Notwithstanding the forfeiture, Johnson would not have succeeded on a Blakely challenge. In a case where a trial court has relied on some Blakely-permissible aggravators and others that are not, the “sentence may still be upheld if there are other valid aggravating factors from which we can discern that the trial court would have imposed the same sentence.” Edwards v. State, 822 N.E.2d 1106, 1110 (Ind. Ct. App. 2005). Here, the record discloses that Johnson had two juvenile true findings, two felony convictions, and one misdemeanor conviction. The prior convictions have already been proven beyond a reasonable doubt and are thus exempt from the Apprendi rule as clarified in Blakely. We are confident that the trial court would have imposed the sixty-year sentence without additional findings.

of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Nevertheless, our review under Appellate Rule 7(B) is deferential to the trial court, and “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The nature of the offense is that Johnson shot Campbell multiple times. The character of the offender is such that he had a criminal history, a history of probation violations, and supported himself by dealing drugs. In light of the nature of the offense and the character of the offender, we do not find Johnson’s sentence, which exceeds the presumptive sentence by five years, to be inappropriate.

### **Conclusion**

Sufficient evidence supports Johnson’s Murder conviction. He has not demonstrated fundamental error in the admission of photographic evidence. His sixty-year sentence is not inappropriate. However, Johnson’s Robbery conviction is not supported by sufficient evidence and is reversed. We remand to the trial court with instructions to vacate the twenty-year concurrent sentence.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and BRADFORD, J., concur.

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<sup>4</sup> Indiana Code § 35-50-2-3 was amended, after the commission of Johnson’s offense, to provide for the imposition of an advisory sentence, as opposed to a presumptive sentence.